88-1508

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES E. SPARKS,
Petitioner,

vs.

THE ARMSTRONG RUBBER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In an age discrimination case under 29 U.S.C. § 621, *et seq.* (1982 & Supp. 1986), where there was direct evidence of a plan to terminate older employees, did the United States Court of Appeals for the Sixth Circuit err in holding that petitioner, a senior employee with seventeen years of exemplary service with the respondent/employer, was not entitled to protection under the Act because it was unlikely that the respondent/employer would have considered him an "older" employee at forty-three.

PARTIES

All parties to this proceeding are listed in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

James E. Sparks, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on December 28, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A, page A-1. The opinion of the United States District Court for the

Middle District of Tennessee is printed in Appendix B, page A-6. The opinion of the United States District Court for the Middle District of Tennessee in *Lester v. The Armstrong Rubber Company*, a companion case, is printed in Appendix C, page A-16.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 28, 1988. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

The statute involved in this case is the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which is printed in Appendix D, page A-19.

STATEMENT OF THE CASE

The petitioner, James E. Sparks (hereinafter "Sparks") brought this action against respondent, The Armstrong Rubber Company (hereinafter "Armstrong") alleging wrongful discharge under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1982 & Supp. 1986).

Armstrong operates a tire building plant in Madison, Tennessee and produces approximately 15,000 tires per day. Sparks and a gentleman named George C. Lester (hereinafter "Lester") were supervisors in the first stage radial tire production section. During the first stage of production, there was a continuous problem with tire carcasses sticking to the splice press machine. After being told by their superiors to work their way out of the problem, Sparks and Lester instructed their tire builders to apply silicone, a substance which was required to be used in the Curing Department as a releasing agent, to the lower jaw of the splice press. This appeared to eliminate the sticking problem. However, one of the builders whom Sparks had in-

structed did not follow Sparks' instructions and improperly applied silicone to the upper jaw of the splice press and consequently produced a few defective tires which were later repaired. Armstrong immediately discharged Sparks and forced Lester to retire under threat of termination. Lester was sixty years of age at the date of discharge; Sparks, who had worked for Armstrong for seventeen years and had an exemplary record, was forty three.

Both Sparks and Lester filed age discrimination actions in the United States District Court for the Middle District of Tennessee. The basis for jurisdiction in the district court was 28 U.S.C. § 1331 (1982) and 29 U.S.C. § 621 *et seq.* (1982 & Supp. 1986). Although the cases were tried before two different district court judges, the proof was substantially the same. In both cases, there was direct evidence of Armstrong's plan to terminate "older" employees. Chief Judge Thomas A. Wiseman, Jr. heard Lester's case and awarded judgment in favor of Lester, stating that Armstrong's articulated reason for discharging Lester was a pretext for age discrimination. Armstrong appealed. In the Sparks case, however, Judge John T. Nixon entered judgment in favor of Armstrong, concluding that Sparks had failed to show that he was terminated because of his age. Sparks appealed the decision.

The two appeals were consolidated in the United States Court of Appeals for the Sixth Circuit. Confronted with contradictory holdings arising out of substantially the same facts, the court of appeals attempted to distinguish the cases by stating that "it was unlikely that Armstrong's management would have considered Sparks an 'older' employee at 43." (Opinion of court of appeals, Appendix A, p. A-5). Based upon this distinction, which was neither raised by Armstrong nor mentioned by the district court in the *Sparks* case, the court of appeals entered a per curiam opinion, not recommended for publication, on December 28, 1988, affirming both judgments.

ARGUMENT

In this case, the United States Court of Appeals for the Sixth Circuit has rendered a decision which effectively holds that an individual, forty-three years of age, cannot be considered an "older" employee who is entitled to protection under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (1982 & Supp. 1986) ("ADEA"). This decision directly conflicts with applicable decisions of the United States Supreme Court and the clear language and intent of the ADEA.

In analyzing the *Lester* case, the court of appeals noted the "irrationality" of firing an employee who, for ten years had received outstanding job performance ratings, merely because of the silicone experiment. The court of appeals also analyzed the direct evidence of age discrimination which Lester presented at trial. This evidence included testimony that Armstrong had never allowed any of its supervisory employees to work until normal retirement age (sixty-five years of age) and testimony as to statements made by Armstrong's manufacturing manager that the company intended to terminate older employees on the basis of their age. Based upon the evidence, the court of appeals held that the district court was entitled to conclude that Armstrong's justification for firing Lester was pretextual.

The same direct evidence of Armstrong's plan to remove "older" employees that was present in the *Lester* case was also before the district court in the *Sparks* case. However, despite this evidence, the court of appeals stated that Sparks' claim of age discrimination is weaker than Lester's for three reasons: (1) Sparks had not been subjected to any overt acts of discrimination due to his age; (2) Sparks initiated the use of silicone and was responsible for the builder who produced the defective tires; and (3) Sparks was only forty-three years old; therefore, it was unlikely that Armstrong's management would have considered Sparks an "older employee."

With regard to the first reason articulated by the court of appeals, the ADEA does not require an employee to have been subjected to overt acts of discrimination, apart from his discharge, in order to make out a case of age discrimination. In fact, a plaintiff may establish a prima facie case of discrimination by circumstantial evidence. *See Maxfield v. Sinclair International,* 766 F.2d 788 (3rd Cir. 1985), *cert. denied,* 474 U.S. 1057 (1986). In the case at bar, Sparks introduced direct evidence of Armstrong's discriminatory intent. The only element remaining was for Sparks to demonstrate that his age influenced Armstrong's decision to terminate him. *See Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893 (3rd Cir. 1987), *cert. dismissed,* 108 S.Ct. 26, 97 L.Ed.2d 815 (1987). The fact that Sparks had not been subjected to any overt acts of discrimination prior to his discharge is immaterial.

The second reason listed above is also without merit. The record contains evidence which indicates that supervisors such as Sparks were supposed to be "problem solvers." Armstrong encouraged supervisors to experiment with various methods to improve tire production. In fact, when the Curing Department had experienced "sticking" problems, Sparks' experiment with silicone resulted in excellent evaluations and Armstrong's adoption of the use of silicone in the Curing Department on a regular basis. Furthermore, the tire builder who applied the silicone improperly was not under Sparks' supervision at the time he misapplied the silicone. Thus, there is no basis for the conclusion by the court of appeals that Sparks' effort to assist Armstrong in solving a difficult and recurring problem in the same manner for which he previously had been commended, was the reason for his discharge.

After analyzing and disposing of the above two reasons mentioned by the court of appeals, it becomes apparent that the only actual distinction between the *Sparks* and *Lester* cases is the fact that at the date of discharge, Sparks was forty-three years of age, whereas Lester was sixty. Based upon this distinction, the

court of appeals states in its option: "[T]he district judge was entitled to conclude that it was unlikely that Armstrong's management would have considered Sparks an 'older' employee at 43." (Opinion of court of appeals, Appendix A, page A-5). Petitioner submits to this Honorable Court that in relying upon such a distinction, the court of appeals has erroneously substituted its opinion as to the types of individuals protected by the ADEA for the opinion of Congress as expressly stated in the language of the ADEA.

Section 621(b) of the ADEA declares the purpose of the Act to be as follows:

> (b) It is, therefore, the purpose of this chapter to promote employment of *older* persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. [Emphasis added.]

29 U.S.C. § 621(b) (1982). Section 631(a) of the ADEA defines the term "older" by specifically setting forth the age limits for individuals protected under the Act. At the time of Sparks' discharge, § 631(a) provided that "[t]he prohibitions in this chapter shall be limited to individuals who are at least 40 years of age, but less than 70 years of age." 29 U.S.C. § 631(a) (1982) (amended 1986). (§ 631(a) was subsequently amended to eliminate the seventy-year-old "ceiling" and to provide protection to all individuals who are at least forty years of age.)

Where Congress uses terms or words that have settled meaning, a court must infer that Congress means to incorporate the established meaning of those terms. *See NLRB v. Amax Coal Company, a Division of Amax, Inc.*, 453 U.S. 322, 329 (1981), *reh'g denied, United Mine Workers of America, Local No. 1854 v. NLRB*, 453 U.S. 950 (1981). The starting point for interpreting a statute is the language of the statute itself and, absent

a clearly expressed legislative intent to the contrary, that language must be ordinarily regarded as conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement. *Badaracco v. CIR*, 464 U.S. 386, 398 (1984).

In the case at bar, Sparks, who was forty-three years of age on the date of his discharge, is clearly within the protection of the ADEA. It is immaterial whether or not the Sixth Circuit considers forty-three to be "older." Congress intended to protect individuals who are at least forty, and this intent is expressly stated in § 631(a) of the Act.

There is nothing in the record which indicates that Armstrong's defense was based in any way upon the assertion that an employee who is forty-three years of age is not protected by the ADEA or cannot be considered an "older" employee. Armstrong was ever-mindful of the age limitations set forth in the ADEA. Its attempt to formulate a plan or scheme to terminate older employees is evidence of Armstrong's awareness of the ADEA's provisions. In the absence of the ADEA, Armstrong would have been entitled to terminate all of its employees, including "older" employees, for any reason or without cause, and would not have needed to devise a plan. Armstrong's management knew that it had to formulate a careful plan to terminate employees between the ages of forty and seventy because those individuals are protected under the ADEA. Therefore, when Armstrong's management was discussing its plan to terminate "older" employees, it was referring to all employees between the ages of forty and seventy, and Sparks, who was forty-three years old, fell within that age bracket.

Even if Armstrong's management used the term "older" in a generic sense and was not cognizant of the age limitations of the ADEA, there is no basis in the record for the court of appeals' conclusion that the term "older" could not apply to an

employee who was forty-three years old. Such a conclusion ignores the likelihood that an employer would consider all employees with many years of service to the company as "older" employees.

In *White v. Westinghouse Electric Company,* 862 F.2d 56 (3rd Cir. 1988), the United States Court of Appeals for the Third Circuit cited the case of *EEOC v. City of Altoona,* 723 F.2d 4 (3rd Cir. 1983), *cert. denied,* 467 U.S. 1204 (1984), for the proposition that seniority and age are "inexorably linked." *White,* 862 F.2d at 62, fn.9. The court in *White* held that the fact that Westinghouse may have fired the plaintiff in order to save pension benefits does go to the question of whether the plaintiff's age was a determinative factor in the company's decision to fire him because the amount of pension benefits is inextricably linked to an employee's years of service to the company and, hence, to his age. *Id.* at 62. Similarly, in the instant case, Sparks offered proof of the amount of money that Armstrong saved through its policy of terminating employees prior to their normal retirement age. This proof does address the question of whether Sparks' age was a determinative factor in Armstrong's decision to discharge him because Sparks' seventeen years of seniority translate into a significantly higher amount of pension benefits and a higher salary than those enjoyed by employees with fewer years of service. When viewed in this light, it is easy to ascertain why Armstrong would have aimed its plan to terminate older employees at a forty-three year old individual with an exemplary record with the company.

CONCLUSION

Confronted with contradictory holdings in two cases which arose out of substantially the same facts, and confronted further with direct and uncontroverted evidence in both cases of Armstrong's plan to terminate older employees, the United States Court of Appeals for the Sixth Circuit elected to solve its dilemma by concluding that the term "older employee" did not refer to an individual who was forty-three years of age. In so doing, the court of appeals ignored the express language of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (1982 & Supp. 1986) and substituted its judgment for that of the United States Congress. Petitioner, James E. Sparks, respectfully submits that said action of the court of appeals constitutes clear error and should be overruled.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 87-6128, 88-5186, 88-5276

George C. Lester,
Plaintiff-Appellee,

James E. Sparks,
Plaintiff-Appellant,

v.

The Armstrong Rubber Company,
Defendant-Appellant, Defendant Appellee.

On Appeal from the United States District Court
for the Middle District of Tennessee.

Filed: December 28, 1988

Before: KEITH, KENNEDY and MILBURN, Circuit Judges.

PER CURIAM. George C. Lester and James E. Sparks brought separate actions which were tried before different judges against Armstrong Rubber Company (Armstrong) under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 612 *et seq*. Lester won a bench judgment, and Armstrong appealed. The District Court ruled for Armstrong in Sparks' ac-

tion, and Sparks appealed. The two appeals were consolidated. Because we find that neither trial judges' factual findings were clearly erroneous, we AFFIRM both judgments.

Lester and Sparks worked as supervisors in the first stage of radial tire production in Armstrong's Madison, Tennessee plant. During the first stage of production, the rubber tire carcass is placed between the jaws of a splice press. Sticking between the carcass and the press was common problem. Weather conditions in the summer of 1983 exacerbated this problem. Lester and Sparks sought the advice of their superiors, and were told to "work [their] way out of it." Sparks experimented with silicone as an antisticking agent and found the results satisfactory. Sparks instructed his tire builders to apply silicone to the lower jaws of the press. He also told Lester that the substance worked perfectly, and Lester and his builders also began using silicone. If properly applied to the lower jaw of the press, silicone causes no damage. However, silicone on the top of the carcass will prevent the tire components from adhering properly. Unfortunately, one of Sparks' builders was sloppy in applying silicone and produced a batch of defective tires, which had to be repaired. When management inquired about the defective tires, Lester and Sparks acknowledged that they had instructed their builders to use silicone. Sparks was immediately discharged, and Lester was compelled to retire under threat of termination. Lester was 60 years of age at the time of his discharge; Sparks was 43.

Lester and Sparks contend that they were discharged not because they authorized the use of silicone, but because of their age. In evaluating an ADEA claim, one of the steps in determining whether the plaintiff has made out a *prima facie* case in a discharge case is whether he was replaced by a younger person. *Chappell v. GTE Products Corp.*, 803 F.2d 261, 265-66 (6th Cir. 1986) (citations omitted).

Armstrong concedes that Sparks made out a *prima facie case*. However, the company asserts that the evidence failed to show

that Lester was replaced by a younger person. But Armstrong's own records, adduced at trial, indicate that between 1981 and 1987, all of the plant's supervisors were younger than Lester. Therefore, his replacement necessarily was younger, and the District Court did not err in finding that Lester had established a *prima facie* case of age discrimination.

Once the plaintiff proves a *prima facie* case, the burden shifts to the employer to produce evidence of a nondiscriminatory reason for discharge. *Chappell,* 803 F.2d at 266. If the employer meets its burden of production, then the plantiff must prove by a preponderance of the evidence that the employer's reason is a pretext for age discrimination. *Davis v. Combustion Eng'g,* 742 F.2d 916, 921 (6th Cir. 1984). Armstrong produced evidence that it fired Lester and Sparks for authorizing their builders to introduce a dangerous substance into the first stage of tire production. Thus, the pivotal issue in both cases is whether the plaintiff proved that this explanation was a pretext for age discrimination. Lester prevailed on this issue below; Sparks did not.

On appeal, findings by the trier of fact must be upheld unless they are clearly erroneous. *West v. Fred Wright Constr. Co.,* 756 F.2d 31,34 (6th Cir. 1985). This Court may not reverse the decision below simply because it "might give the facts another construction, resolve the ambiguities differently or reach a conclusion different from that of the district court." *Id.*

Turning first to Lester's case, we conclude the District Court did not clearly err in finding that Armstrong's explanation for Lester's firing was a pretext for age discrimination. The company points out that silicone can cause tire defects if improperly applied, risking lives and exposing the company to liability. Firing Lester, Armstrong argues, was a legitimate if harsh response to the unauthorized use of a dangerous substance. However, several factors diminish the strength of this explanation and support the trial court's finding that it was pretextual. While

the company characterizes Lester's use of silicone as unauthorized, it was only unauthorized in the sense that no formal written specification approved the use of silicone on the splice press. But the same was true of many common procedures in the production process. Silicone had long been used in the curing department, although this use was not approved of in the company's written specifications. Nor do the specifications mention sterate, fish oil, soap, or any of the other substances commonly used as antisticking agents in the first stage of tire building. While silicone can impair tire adhesion, so can these substances if improperly applied. Lester was never warned not to experiment with silicone. On the contrary, he was told to find a solution to the sticking problem. Finally, the only losses suffered by Armstrong were caused by one of Sparks' builders — who was not fired — not Lester or any of his workers.

The trial court's conclusion that Armstrong's justification for discharging Lester was pretextual did not rely only on the irrationality of firing him for the silicone experiment; it was reinforced by direct evidence of age discrimination. The District Court credited James Masiongale's testimony that production Manager Custer told him that Armstrong had a long range plan to weed-out older employees through poor evaluations. From 1973 until 1983, Lester had always received outstanding job performance ratings. But his last evaluation by Clay James, made one month prior to his termination, was much lower: "adequate." Subsequent to the 1983 evaluation, James told Lester that at 60 he was growing too old to work the production line, and said he was considering moving Lester to the "chip board" (quality control) — a less desirable position viewed as punishment by employees. A short time later, he was terminated. Armstrong protests that none of this is relevant, since Lester was not removed through low evaluations. But this evidence was probative of a plan to remove older employees. If the company's goal was to remove older employees, the district judge was entitled to believe that it would use means other than poor evaluations to achieve it.

In light of the direct evidence of age discrimination and the weaknesses in Armstrong's explanation of Lester's termination, we conclude the District Court did not clearly err in finding for Lester.

While Sparks' discharge arose out of the same incident, we conclude that the District Court did not clearly err in rejecting his allegations of age discrimination. In close cases, the clearly erroneous standard of review will sometimes mandate the affirmance of ostensibly contradictory findings by different triers of fact. Moreover, Sparks' claim of age discrimination is weaker than Lester's in several respects. Unlike Lester, Sparks had not been subjected to any overt acts of discrimination due to his age. While the District Court in Sparks' case also credited Masiongale's testimony about the company's plan to eliminate older employees, the district judge was entitled to conclude that it was unlikely that Armstrong's management would have considered Sparks an "older" employee at 43. Further, Armstrong's explanation for the firings is somewhat stronger in Sparks' case, since Sparks initiated the use of silicone in the first stage of tire production and was responsible for the builder who produced the defective tires. It may well have been harsh and unreasonable for Armstrong to fire an exemplary employee like Sparks for attempting to solve a problem on the company's behalf — especially given the fact that the company had approved of and adopted earlier experiments by Sparks. But the ADEA is not a general wrongful discharge statute; it condemns only age discrimination. In light of the paucity of the evidence that Sparks' firing was motivated by his age, we cannot say the decision of the District Court was clearly erroneous.

The decisions below are AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

DOCKET NO. 3-85-0712

James E. Sparks

vs.

The Armstrong Rubber Company

MEMORANDUM

Plaintiff in this action, James E. Sparks, claims that he was discharged by defendant Armstrong Rubber Company (hereinafter "Armstrong" or "the Company") on July 18, 1983, because of his age in violation of the provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* Defendant Armstrong asserts that its terminatin of plaintiff was for a legitimate, nondiscriminatory reason. This case was tried by the Court, without a jury, on October 30, 1986, April 30, 1987, and September 21, 1987. The Court, having considered the testimony of the witnesses, the exhibits, and the entire record, hereby states its findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

Defendant Armstrong is a Connecticut corporation that has a tire assembly plant in Madison, Davidson County, Tennessee. Plaintiff Sparks was born on February 18, 1940, and began working at the plant presently operated by Armstrong on November 11, 1965. Sparks originally was employed as an hourly employee on the curing line, but was promoted to management in 1966. After working in various areas at the plant, he then was promoted to senior foreman. In 1975, Arm-

strong demoted Sparks, and in 1979 he was assigned as a training foreman. In 1981, and extending through his dismissal in July of 1983, Sparks was assigned concurrently to two positions in the first stage tire assembly area: training foreman and production line supervisor. Sparks was evaluated each year by his supervisors. In each of his evaluations for the last five years preceding his termination, he was evaluated as above standard or excellent.

First stage tire assembly encompasses the initial production of a radial passenger car tire. A tire builder places strips or sheets of rubber on a metal drum that rotates on a tire building machine. After a sufficient number of plies of rubber are applied, the tire builder removes the tire carcass from the machine and places it into a splice press that insures a proper splicing of the plies. The carcass then is placed by the tire builder on a buggy and is transported to the second stage radial tire assembly area. Sparks supervised work performed on 37 tire building machines in the first stage radial tire assembly area.

Armstrong maintained a number of specific tire building specifications according to which passenger tires were built. In addition, Armstrong also had general specifications and standard practice bulletins setting forth specific procedures. The tire building specifications contained no reference to the use of releasing agents in conjunction with the building of tires to prevent the tires from sticking to the machines on which the tires were being built, but a standard practice bulletin authorized the use of sterate for this purpose. The proof revealed that lubricants such as soap, Pledge, and fish oil also were used routinely in first stage tire assembly to prevent the carcass from sticking to the metal drum and splice press. Sterate first was used after a supervisor experimented with the use of Ivory soap as a releasing agent. Sterate is a soap-like substance that Armstrong began to manufacture after having success with the use of Ivory soap as a releasing agent.

Releasing agents were used only on the inside of a tire. If sterate or another releasing agent got on the outside of a tire, the tire was damaged. A limited amount of sterate on the outside of a tire, however, did not result in damage because sterate cooks out during the curing process and did not present any danger to the building of the tire. Damaged tires were removed from the line and washed before being sent on through the line.

Silicone was not among the group of products routinely used in first stage tire assembly as a releasing agent. Silicone, however, was used in the curing department to keep the inside of a tire from sticking to what is referred to as an air bag. Plaintiff Sparks was the employee who first experimented with silicone after facing problems in the curing department similar to those being experienced in first stage tire assembly. His efforts resulted in the adoption by the Company of the use of silicone in the curing department on a regular basis.

The series of events that resulted in Sparks' termination occurred in July of 1983. The summer heat was aggravating the sticking problem in first stage tire assembly, and Sparks was told by Ben Marberry, the superintendent of tire assembly, that Sparks and the other supervisors would have to work their way out of the problem and that they might use sterate. Sparks then began experimenting with the use of silicone as he had in the curing department. He took a rag, dipped it in silicone, squeezed it to the point where it was damp, and wiped the bottom plate of the splice press. The splice press released the carcass, and Sparks followed the tires with which he was experimenting through the second stage and on through curing. The tires had no difficulty and the tread stuck properly to the carcass.

Thereafter, Sparks instructed the tire builders on his shift in first stage tire assembly how to apply the silicone to the bottom part of the splice press to eliminate the sticking. Sparks obtained four spray bottles of silicone from the curing department and issued them to four tire builders who were having particular difficulty with sticking. In doing so, Sparks was working to solve

the sticking problem to the Company's benefit, and his actions were in accordance with his supervisor's instructions to work out the problem and with the general practice of using releasing agents to prevent sticking. Sparks, however, was the first supervisor to use silicone as a releasing agent in first stage tire assembly.

One of the tire builders to whom Sparks issued a bottle of silicone was Charles Thomas. Sparks instructed Thomas on how to use the silicone properly, but Thomas did not follow Sparks' instructions. He sprayed the silicone directly onto the splice press, resulting in silicone getting on the top and bottom of the carcasses, and even on the floor around the machine.

The problem was discovered on July 17 and 18, 1983, when Sam Dixon, the second stage tire assembly foreman, found that his tire builders were having difficulty getting the belt package to stick to the carcass prepared by first stage tire assembly. The builders' problem was found to have been caused by a filmy substance in the area of the splice press that was killing the tack and causing the belt tread package not to stick to the carcass. Dixon attempted to build the tires himself but was unsuccessful. He sent the defective carcasses to the tire repair area. These carcasses had been built by Thomas. They subsequently all were repaired, except for a few that were sent to the technical department.

On the morning of July 18, 1983, Dixon reported the above problems to Marberry. Marberry then began an investigation to determine how the filmy substance got on the carcasses. Marberry talked with supervisors and tire builders and learned that the silicone had been issued to the tire builders by Sparks and that Sparks and another supervisor, George C. Lester, were the only supervisors who had used it. Marberry also learned that the use of silicone had not been sanctioned by the technical services department.

At about 2:30 p.m. on July 18, Marberry met with Clay James and Richard Hartsock, both of whom were tire assembly

superintendents. As they were discussing the situation, Sparks entered and acknowledged that he had authorized the use of silicone. Marberry told Sparks to go home for the balance of the day and submitted a report to his superior, E.E. Custer, in which he outlined the problem and recommended an immediate dismissal of Sparks and a demotion of Lester. The following day, Sparks was terminated for the unauthorized use of silicone in first stage tire assembly. Lester was given the option of resigning, retiring, or being discharged. Lester retired effective August 1, 1983. Sparks was replaced by a younger employee, Rodney Morgan.

One additional fact that must be noted is that in October of 1980 or 1981, two to three years before the events resulting n Sparks' termination occurred, E.E. Custer, the manufacturing manager, stated to James Masiongale, a foreman supervisor in tire assembly, that Armstrong had a long range goal "to get rid of all the older and weaker supervisory personnel in that plant." According to Masiongale, Custer indicated that the plan would be achieved through the use of evaluations.

II. CONCLUSIONS OF LAW

Plaintiff alleges discriminatory treatment in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* This Act is designed: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). More specifically, the objectives of this provision are clearly delineated in 29 U.S.C. § 623(a)(1) and (2), which make it unlawful:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

The allocation of the burden of proof in age discrimination in termination cases was articulated by the Sixth Circuit in *Wilkins v. Eaton Corp.*, 790 F.2d 515 (6th Cir. 1986). First, plaintiff must establish a prima facie case of age discrimination by showing:

(1) that he was a member of the protected age group (40 to 70 years of age);

(2) that he was discharged;

(3) that he was qualified for the position; and

(4) that he was replaced by a younger person.

Id. at 520. *See Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 99 (6th Cir. 1982).

Second, if the plaintiff proves a prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the plaintiff's termination. *Wilkins*, 790 F.2d at 521. The defendant successfully meets this burden if it "raises a genuine issue of fact as to whether it discriminated against the plaintiff." *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981). The defendant is not required to convince the Court that the actual source of its motivation was the *proffered reasons*. *See id.* The plaintiff's "prima facie case of discrimination will be rebutted if the employer articulates lawful reasons for the action; . . . the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *See id.* at 257.

Third, if the defendant satisfies its burden, the plaintiff must demonstrate that the defendant's stated reason "is a mere pretext or 'cover-up' for what was in truth a discriminatory purpose." *Wilkins,* 790 F.2d at 521 (quoting *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1012 (1st Cir. 1979)). This issue "requires a consideration of the two opposing reasons for discharge to determine whether [plaintiff's] discharge would not have occurred 'but for defendant's motive to discriminate against him because of his age.' " *Wilkins,* 790 F.2d at 522 (quoting *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 240 (4th Cir. 1982)). Thus, the pretext stage is a critical point in the age discrimination trial not only because the issues are sharpened, but also because the trial court is considering all the evidence in order to determine whether purposeful discrimination has been proven. "The burden of producing evidence of 'pretext' essentially merges with the burden of persuasion, which always lies with the plaintiff." *Wilkins,* 790 F.2d at 522. As in all other civil litigation, the ultimate burden in age discrimination cases of proving by a preponderance of the evidence the existence of discrimination in a challenged employment practice of the defendant is on the plaintiff.

In the instant case, the parties agree that plaintiff has made out a prima facie case of age discrimination. He was a member of the protected class because he was 43 years old on July 18, 1983, the date of his discharge. His qualifications for the job he held clearly were reflected in the good evaluations he received in the years preceding his discharge. Finally, he was replaced by a younger employee, Rodney Morgan.

Defendant asserts as a justification for plaintiff's discharge that plaintiff made an unauthorized use of silicone as a releasing agent to correct the problem of sticking in first stage tire assembly. The testimony revealed that silicone had not been used previously and its improper use caused damage to tires. Under these circumstances, the Court must conclude that defendant has provided evidence that would allow a trier of fact ra-

tionally to conclude that plaintiff's termination was not motivated by discriminatory animus. In short, defendant has offered a legitimate justification for its termination of plaintiff.

Turning to the question of whether plaintiff has shown by a preponderance of the evidence that the defendant's justification was a mere pretext for what was in truth a discriminatory purpose, the Court finds that plaintiff has not met this burden. The Court may not agree with defendant that 17 years of hard work should be disregarded because of a single mistake, particularly where plaintiff was acting for the benefit of the defendant, but this Court may not focus on the soundness of defendant's business judgment. Instead, the Court must consider whether age was the determining factor in plaintiff's discharge.

The proof revealed that plaintiff used silicone, a potentially harmful compound, without first obtaining permission to do so. Further, the proof indicated that although he instructed the tire builders in the use of the silicone, he did not supervise their activities adequately because one of the tire builders used the silicone in a fashion that it got all over the machine and on the floor next to the machine. Although E.E. Custer, the manufacturing manager, made statements which indicate that the Company intended to terminate older employees on the basis of their age, the Court finds that plaintiff failed to prove that his termination was founded on a desire to discriminate against him on the basis of his age. In short, the Court finds that defendant's decision is entitled to deference as a business judgment founded on considerations other than age.

III. SUMMARY

Plaintiff in this lawsuit, James E. Sparks, claims that in July of 1983, he was terminated by defendant Armstrong Rubber Company because of his age in violation of the Age Discrimination in Employment Act, 29, U.S.C. § 621, *et seq.* The Court FINDS that plaintiff has failed to show by a preponderance of

the evidence that he was terminated because of his age and, accordingly, the Court hereby ENTERS JUDGMENT for defendant Armstrong Rubber Company.

An Order will be entered in accordance with reasoning set forth in this Memorandum.

This the 8th day of February, 1988.

/s/ illegible
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

DOCKET NO. 3-85-0712

James E. Sparks

vs.

The Armstrong Rubber Company

ORDER

In accordance with the contemporaneously entered Memorandum, the Court hereby ENTERS JUDGMENT for defendant as to plaintiff's claim of age discrimination.

Entered this the 8th day of February, 1988.

/s/ illegible
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
COLUMBIA DIVISION

Civil Case No. 03:85-0564

September 4, 1987 *et seq.*
Nashville, Tennessee

George C. Lester,
Plaintiff,

v.

The Armstrong Rubber Company,
Defendant.

TRANSCRIPT OF JUDGE'S RULING
BEFORE THE HONORABLE THOMAS A. WISEMAN, JR.

APPEARANCES:

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Official Court Reporter:

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THE COURT: Gentlemen, the plaintiff clearly made out a prima facie case in this case. The plaintiff, Mr. Lester, is a member of the protected class between 40 and 70. He's suffered adverse personnel action. He is qualified for the job and was replaced by a younger person. The defendant has articulated a non-discriminatory reason for the discharge, that is that the plaintiff, Mr. Lester, failed to report that Mr. Sparks was using and instructing his people in the use of silicone on his line.

The Court finds that the plaintiff has by a preponderance of the evidence proved this reason to be pretextual. This Court is aware of the injunction that it should not substitute its judgment for the business judgment of the defendant. However, the articulated business judgment of the defendant must have some rationale. It is totally irrational in this Court's opinion that Mr. Lester after 14 years of, according to his supervisor, dedicated, devoted service, would be fired for the reason that has been articulated. It's irrational on its face.

None of Mr. Lester's tires were turned back. No defective tires were produced on his line. Apparently, the operator on his line that used silicone used it the way he was instructed to use it, putting it on the bottom jaw of the alligator. Mr. Thomas, on the other hand, who turned out all the bad tires, didn't use it as he was instructed by putting it on a rag and rubbing only the bottom jaw, he sprayed it all over the place and apparently all over the floor, too. If that hadn't happened, probably this lawsuit would never have occurred.

But the Court finds the articulated reason to be just absolutely irrational. It is supported further as being pretextual by other evidence which the Court credits. The Court credits the Masiongale testimony that Mr. Custer said there was a plan to get rid of older employees through the use of lower evaluations.

Mr. James' explanations of the lower evaluations of Mr. Lester are lacking in credibility.

Furthermore, the Court credits the testimony of the plaintiff rather than that of Mr. James with respect to the discussions about his age and moving him to the penal farm or pasture on the chip desk.

The Court further credits the testimony of Mr. Richardson over that of Mr. Hartsock with respect to the Hartsock statement that only below-standard rating would be given on the chip board desk.

Bottom line, gentlemen, is that the company's articulated reason is pretextual and the Court finds that the plaintiff, Mr. Lester, received adverse — was discharged, as a matter of fact. He was claimed to have been given some options but, in fact, he was discharged and his age was a factor in the effecting of the discharge.

Consequently, the Court will order immediate reinstatement of Mr. Lester and will award back pay. Back pay will be credited at the rate of $33,500 per year for the years '84, '85, '86, and two-thirds of 1987. Credited against that will be the earnings that Mr. Lester has made otherwise, $6,000 in 1984; $12,000 in 1985; $13,000 in 1986. And I don't recall the testimony, Mr. Howser, but you will give credit for whatever he earned in the year 1987. Also credit against that will be the $168.45 per month retirement that he has received over this period of time. Immediate reinstatement will be ordered.

Any questions?

Court will be in recess until 9:00 tomorrow morning.

(Whereupon, court was adjourned.)

APPENDIX D

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the advantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer accetability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

(Pub.L. 90-202, § 2, Dec. 15, 1967, 81 Stat. 602.)

29 U.S.C. § 621

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

(Pub.L. 90-202, § 12, Dec. 15, 1967, 81 Stat. 607; Pub.L. 95-256, § 3(a), (b) Apr. 6, 1978, 92 Stat. 189, 190; 1978 Reorg.Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub.L. 98-459, Title VIII, § 802(c)(1), Oct. 9, 1984, 91 Stat. 1792.)

29 U.S.C. § 631

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928.

28 U.S.C. § 1254

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(As amended Oct. 21, 1976, Pub.L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, Pub.L. 96-486, § 2(a), 94 Stat. 2369.)

28 U.S.C. § 1331